BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

IN THE MATTER OF THE REQUEST FOR AGENCY ACTION OF BERRY PETROLEUM COMPANY, LLC, A WHOLLY OWNED SUBSIDIARY OF LINN ENERGY, LLC, AS SUCCESSOR IN INTEREST TO BERRY PETROLEUM COMPANY, FOR AN ORDER FORCE-POOLING THE INTERESTS OF ALL OWNERS REFUSING OR FAILING TO BEAR THEIR PROPORTIONATE SHARE OF THE COSTS OF DRILLING AND OPERATING THE DRILLING AND SPACING UNITS LOCATED IN SECTIONS 5 AND 7 IN TOWNSHIP 6 SOUTH, RANGE 4 WEST, USM, DUCHESNE COUNTY, UTAH.	**RESPONSE TO DIVISION OF OIL, GAS AND MINING'S MEMORANDUM IN OPPOSITION TO THE REQUEST FOR AGENCY ACTION AND IN SUPPORT OF MOTION TO CONTINUE HEARING** **Docket No. 2014-012** **Cause No. 272-04**

INTRODUCTION

Berry Petroleum Company, LLC, a wholly owned subsidiary of LINN Energy, LLC, as successor in interest to Berry Petroleum Company ("Petitioner"), filed its Request for Agency Action ("Request") in this matter on January 10, 2014. Shortly thereafter, Petitioner and the Utah Division of Oil, Gas and Mining (the "Division"), by and through their respective counsel, began a series of discussions regarding this Request. In these conversations, the Division expressed concern with the force-pooling of an unlocatable corporation. Specifically, the Division expressed doubt as to whether a business entity, particularly the corporation sought to be force-pooled in this matter, Burton/Hawks, Inc. ("Burton"), the owner of a portion of the working interest in a federal lease, could actually be unlocatable.[1] Although it believed that it

[1] The Division makes the statement that "[Burton] has a registered agent to accept notice." (Div. Memo. at 2.) However, as admitted by the Division, Burton has not been registered in Utah since 1989. As an expired entity, Burton does not currently have a registered agent. Its prior registered agent, CT Corporation System, is a business responsible for accepting service of process for current clients. In any event, Burton is an expired corporation and sending notice to its prior registered agent would not be useful.

had already conducted a good faith effort to locate a successor to Burton, [2] Petitioner chose to continue this matter for two one-month periods while it conducted additional research. As stated in the Affidavit of Terry L. Laudick and the Second Affidavit of Terry L. Laudick, Petitioner reviewed an exhaustive list of sources, including the records of the Utah Division of Corporations, the Colorado Secretary of State, the Wyoming Secretary of State, the Nevada Secretary of State, the Delaware Secretary of State, as well as a closed bankruptcy proceeding for one of the many companies who acquired some but not all of the assets formerly held by Burton.[3] (*See* Aff. Terry L. Laudick at ¶ 4; Second Aff. of Terry L. Laudick at ¶¶ 4-14.) Despite its extraordinary efforts, Petitioner has been unable to locate a successor to Burton's interest in the Subject Lands. Consequently, Petitioner has confirmed that the successor in interest to Burton is unlocatable and has chosen to move forward with its request to force-pool Burton's interest.

Petitioner has drilled, is in the process of drilling, or is planning on drilling a total of 24 wells on the Subject Lands.[4] Because Burton is unlocatable, Petitioner is required to pay Burton's proportionate share of the costs of drilling and operating these wells. Petitioner is requesting that the Board force-pool Burton's interest and impose a non-consent penalty to

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[2] Burton is the last owner of record in the records of both Duchesne County and the Bureau of Land Management.

[3] Based on its research Petitioner has pieced together that Burton, which claimed to be a Colorado Corporation but was never organized in Colorado, changed its name to Hawks Industries, Inc., a now expired Delaware Corporation. Then, a presumably related Hawks Industries, Inc., a Nevada Corporation (not a Delaware Corporation), merged into EMEX Corporation, an entity that has went bankrupt (Chapter 7 liquidation) and no longer exists. Based on the possibility that EMEX had succeeded to Burton's interest in the Subject Lands, Petitioner reviewed the pleadings from the bankruptcy case and even contacted the former bankruptcy trustee, prior counsel, and one of the purchasers of an interest from the bankruptcy estate. These efforts disclosed that the subject property was not included in the bankruptcy proceeding. And, even assuming that the property was supposed to be included in the bankruptcy, there is no way to name a successor to this interest without reopening the bankruptcy proceeding and selling the interest through a competitive bidding process.

[4] Petitioner's Request originally sought to force-pool 32 wells. Petitioner is amending its Request to remove the 8 wells in the Subject Lands that were drilled in 2010. The remaining 24 well were either drilled in 2013 or 2014 or have not yet been drilled.

compensate it for the substantial investment and inherent risk involved in carrying Burton's interest in these wells.

At the Division's request, Petitioner has again requested a one-month continuance so that it can address additional concerns raised in the Division's Memorandum in Opposition to the Request for Agency Action and in Support of Motion to Continue Hearing ("Div. Memo.").

ARGUMENT

The Division has objected to the Request on the grounds that Petitioner has not provided a basis for relief and that its requested relief is prohibited by Utah law. As discussed below, the Division's arguments are contrary to the facts in this matter and are not in accord with Utah law.

I. PETITIONER HAS PROVIDED A BASIS FOR RELIEF.

The Division's primary argument is that Petitioner, if allowed to proceed with the hearing, may fail to satisfy its evidentiary burden for force-pooling. (*See* Div. Memo. at 3.) Even assuming that this was the standard on which an objection should be based, which it is not, the Division's concerns are unfounded. In the materials submitted in this matter, Petitioner has set forth a basis for its requested relief.

A. Standard.

Utah Amin. Code R641-104-100(133) provides that "Persons other than the Board or Division may petition for Board action." This petition shall be in the form of a "Request for Agency Action" that shall include, among other things: (1) "A statement of the legal authority and jurisdiction under which Board action is requested" and (2) "A statement of the facts and reasons forming the basis for relief." *See* Utah Admin. Code R641-104-100(133.500-700).

1. Petitioner Has Provided a Statement of the Legal Authority and Jurisdiction.

In its memorandum, the Division states, without citation to authority, that "Petitioner has the burden to persuade the Board that action is legal and good policy." (Div. Memo. at 3.) Although this is a laudable standard, it is not the correct legal standard. Utah Admin. Code R641-104-100(133.500) states that Petitioner must include in its request for agency action "A statement of the legal authority and jurisdiction under which Board action is requested." (emphasis added).

In its Request, Petitioner provided a statement of the legal authority in the introductory paragraph: "[Petitioner] pursuant to Utah Code Ann. §§ 40-6-5 and 40-6-6.5, hereby requests the [Board] to enter an order force-pooling the interests...." (Request at 1.) Similarly, Petitioner provided a statement regarding the Board's jurisdiction: "The Board has jurisdiction of the parties and the subject matter of this Request pursuant to Utah Code. Ann. § 40-6-1, *et seq.*" (Request at 2, ¶2.) These statements provide both the legal authority and jurisdiction for the Board to granted the requested relief.

Nevertheless, to the extent that additional briefing regarding the legal authority for force-pooling has been requested, Petitioner provides the following analysis. The force-pooling statute, Utah Code Ann. § 40-6-6.5(2)(a), provides that the Utah Board of Oil, Gas and Mining (the "Board"), "[i]n the absence of a written agreement for pooling...may enter an order pooling all the interests in the drilling unit for the development and operation of the drilling unit." The force-pooling order shall provide for "the reimbursement to the consenting owners for any nonconsenting owner's share of the costs."[5] *See id.* at (4)(b)(emphasis added). In addition to the recovery of costs, the consenting owners are entitled to a so-called non-consent penalty, in an amount to be determined by the Board. *See* Utah Code. Ann. § 40-6-6.5(4)(d)(i)(D).[6] According to the force-pooling statute, a non-consenting owner is defined as "an owner who after written notice does not consent in advance to the drilling and operation of a well or agree to bear his proportionate share of the costs." Utah Code Ann. § 40-6-2(11)(emphasis added). The operator is required to make a "good faith" effort to acquire the owner's consent. *See* Utah Admin. Code 649-2-9. If the consent cannot be obtained, the consenting owners have the right to request that

[5] (*See* Request at 4, ¶ 8).
[6] (*See* Request at 4, ¶ 9).

the non-consenting owners interest be force-pooled by order of the Board. *See id.*; Utah Code Ann. § 40-6-6.5.

Accordingly, the force-pooling statute allows the consenting owners to recoup the proportionate share of costs together with a penalty from those owners who, following a good faith effort to obtain their consent, have not consented in advance to the pay their share of the costs in the drilling and operation of a well.

2. Petitioner Has Provided a Statement of the Facts and Reasons Forming the Basis for Relief.

In its memorandum, the Division states that Petitioner "must set forth the facts and reasons forming the basis for the relief."[7] (Div. Memo. at 3.) In conversations with Petitioner and in its objection to the Request, the Division has indicated that its interpretation of this provision requires Petitioner to provide, what amounts to, the full evidentiary basis for its requested relief prior to the hearing. (*See id.* at 3-4.) Although Petitioner is and has been fully prepared to present evidence supporting its statements of the facts and reasons forming the basis for relief at the time of the hearing, it is unaware of any requirement that it do so in advance. Petitioner believes that the Division's demands reflect a fundamental misunderstanding of the rules and a departure from the Board's prior practice.

The rule governing the sufficiency of a request for agency action requires only that the Petitioner provide a "statement of the facts and reasons forming the basis for relief," not a comprehensive presentation of those facts and reasons. *See* Utah Admin. Code R641-104-100(133.700)(emphasis added).

Petitioner has satisfied its burden to provide a statement of the facts and reasons forming the basis for relief. Specifically, in its Request, Petitioner stated that:

> Petitioner's efforts to contact Burton using their last address of record, have been unsuccessful. Petitioner believes that Burton is no longer a valid entity.
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> ...

[7] The Division incorrectly cites Utah Admin. Code R641-104-100(133.500) as requiring Petitioner to "set forth the facts and reasons forming the basis for relief." (Div. Memo at 3.) The correct citation is found in Utah Admin. Code R649-104-100 (133.700).

> [Petitioner] has sent written notice to Burton in an attempt to negotiate with them for their interest in the Subject Lands. As a result, by definition, Burton is a non-consenting owner.

(*See* Request at ¶¶ 6-7.) In addition to the statements made in the Request, as part of its exhibits in this matter, Petitioner submitted the Affidavit of Terry L. Laudick, which states, in relevant part, that:

> 4. [Petitioner] has conducted an extensive search of the records of Duchesne County, the Utah State Office of the BLM, the Utah Division of Corporations, State and Federal Courts, the United States Bankruptcy Court for the District of Colorado in order to locate [Burton] or its successor in interest. [Petitioner's] attempts to locate this corporation or its successor in interest have been unsuccessful.
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> 5. Based on the unsuccessful attempts to locate this corporation, [Petitioner] has deemed [Burton] to be unlocatable.

(Aff. of Terry L. Laudick at ¶¶ 4-5.) Petitioner's statements clearly indicate that, after a good faith effort, it has determined that Burton is unlocatable, and that, as an unlocatable party, Burton could not consent in advance to the drilling and operation of any of the wells located on the Subject Lands. Therefore, Petitioner has provided statements of facts and reasons allowing the Board to conclude that Burton is, by definition, a statutory non-consenting owner.

Petitioner has satisfied its burden for a request for agency action and has provided statements of both the legal authority and jurisdiction and the facts and reasons forming the basis for relief. Petitioner is entitled to present its case to the Board.

II. WRITTEN NOTICE IS NOT REQUIRED FOR UNLOCATABLE OWNERS.

The Division has taken the position that "[Petitioner] must provide proof that it gave [Burton] notice on each of the...wells in which it is asking the Board to force-pool" and, "[w]ithout that proof, the Board cannot force-pool...." (Div. Memo. at 4-5.) In doing so, the Division ignores the prior precedent of the Board regarding unlocatable owners and runs the risk of establishing a harmful and unworkable policy neither required nor contemplated by the statutes or rules.

A. Prior Decisions of the Board Have Not Required Written Notice in Order to Force-Pool Unlocatable Owners.

In the past, the Board has not required actual written notice as a prerequisite to force-pooling unlocatable owners. The Board has repeatedly held that that unlocatable parties are, by definition, nonconsenting parties for purposes of force-pooling. *See* Docket No. 2011-011, Cause No. 272-02; Docket No. 2012-042, Cause No. 139-99. Significantly, in these cases, no actual written notice was ever given to the unlocatable owner; nevertheless, the Board declared that the unlocatable owners were statutory non-consenting owners and issued orders force-pooling their interests. Although these matters involved deceased individuals, there is no legal basis for distinguishing between a deceased person and an expired corporation for purposes of force-pooling.

In the context of this discussion, Petitioner points out that the Division has taken issue with the written notice that Petitioner attempted to send to Burton. (Div. Memo. at 4-5.) As discussed above and as set forth in Petitioner's Request and supplemental filings in this matter, Burton is an unlocatable party. (*See* Request at 3-4 ¶¶ 6-7; Exhibits I and J.) To document that Burton is unlocatable, Petitioner submitted a letter that it sent to Burton's last known address of record attempting to give it notice of its opportunity to participate in "any given well" identified in the letter. (*See* Exhibit J.) As expected, this letter was returned as undeliverable. (*See id.*) Instead of recognizing this letter for what it was—an attempt to comply with the procedural prerequisites for force-pooling and an effort to provide documentation that Burton is unlocatable—the Division focuses on what it perceives to be the deficiencies with this notice.[8] (Div. Memo at 4-5). Although, admittedly, this letter did not include all of the wells covered by the Request, Petitioner was under no obligation to continue to send notices to an invalid address.[9] Doing so would be futile. *See Ohio v. Roberts*, 448 U.S. 56, 74 (1980)("The law does not require the doing of a futile act."). The probative value of this letter is that it provides further

[8] The Division characterized this letter as "a collective demand" that, presumably, does not satisfy the requirement that an owner be given the opportunity to participate in each and every well as set forth in *Hegarty v. Board of Oil, Gas and Mining*, 57 P.3d 1042. (*See* Div. Memo. at 4-5.) However, the letter gives Burton the opportunity to participate in "any given well" and, in the exhibit to the letter, requests that Burton indicate its election to participate on a well-by-well basis. (*See* Exhibit J.)

[9] Concurrent with this memorandum, Petitioner is amending its Request to remove the 8 wells in the Subject Lands that were drilled in 2010.

evidence that Burton is unlocatable and that written notice could not be given, rendering Burton a statutory non-consenting owner.

B. Policy Considerations.

If the Board were to adopt the Division's position and require actual written notice for unlocatable owners, it would have a number of unintended consequences. First, as discussed above, it would call into question prior decisions of the Board creating unjustifiable inconsistencies that could result in legal challenge. Second, it would, by default, create a rule requiring parties to perform whatever curative is necessary (including probates, quiet title actions, winding up and distributing corporate assets, and bankruptcy proceedings) in order to find every heir, devisee, or successor to an unlocatable party's interest as a prerequisite to utilizing the force-pooling statute. Under this scenario, the evidentiary burden required to prove that every successor in interest had been located and given actual written notice would result in a de facto prohibition on force-pooling these parties, frustrating a significant application of the force-pooling statute. Finally, it would reward an owner who remains intentionally unlocatable until after a well has been drilled, only to reappear once the well has proven to be productive. The full risk in drilling a well would fall on the consenting owners, without legal recourse under the force-pooling statute.

III. THE POOLING ORDER SHOULD BE EFFECTIVE AS OF THE DATE OF THE SPACING ORDER.

In its memorandum, the Division objected to Petitioner's request for retroactive pooling, arguing that a spacing order is a prerequisite for pooling and that a pooling order may not predate the spacing order, absent inequitable conduct. (Div. Memo. at 3-4.) Petitioner agrees. For this reason, Petitioner will amend its Request in this matter and will no longer ask that pooling be made effective prior to the spacing order. Instead, Petitioner will ask that its request for spacing (Docket No. 2014-004, Cause No. 272-03) be made effective for each drilling unit as of the date of first production for each of the wells located in the respective drilling units or, for the wells that have not yet began producing, the date the spacing order is issued.

Petitioner believes that retroactive spacing is appropriate in this matter because the requested spacing will not alter the distribution of production for any of the owners in the Subject Lands. Currently, the Subject lands are unspaced and, therefore, production is governed by the law of capture and will be distributed to the federal lessees based on the respective ownership where the well is located. *See Cowling v. Board of Oil, Gas and Mining*, 830 P.2d 220, 224-5 (Utah 1991)(holding that the rule of capture governs the parties' rights prior to entry of a spacing order). As shown in Exhibits A and K, the mineral and leasehold ownership in each of the drilling and spacing units is uniform. As a result, the distribution of production in the subject wells will not change after spacing. Notably, the only reason that Petitioner is seeking to space the Subject Lands, is because it is a prerequisite to force-pooling. Under these circumstances, retroactive spacing is just and reasonable.

Although, upon initial review, retroactive spacing might appear to be barred by the holding in *Cowling*, the current situation is distinguishable. In *Cowling*, the court's holding was limited to the question of whether a pooling order could predate a spacing order. *See Cowling*, 830 P.2d 220. It did not address whether a spacing order could be issued retroactively. *See id.* Even if the holding in *Cowling* could be interpreted as prohibiting retroactive spacing under the circumstances in that case, it is still not dispositive of the issues in this matter. The court in *Cowling* was concerned that retroactive pooling "would give adjoining interest owners correlative rights before those rights are definable," resulting in a redistribution of royalty already paid. *See id.* at 225. Here, however, the ownership of the parties in the drilling and spacing units do not differ from the rights of the parties prior to spacing. (*See* Exhibits A and K.) Thus, the change in correlative rights and the redistribution of royalty are not at issue. Accordingly, retroactive spacing is appropriate.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Board deny the Division's objection to its request for agency action and allow the Petitioner to proceed with its hearing in this matter.

DATED this 7th day of May, 2014.

BERRY PETROLEUM COMPANY, LLC

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